82-991

No. ____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL ASSOCIATION OF HOME HEALTH AGENCIES, *et al.*,

Petitioners,

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES C. PYLES,
RONALD N. SUTTER,
BRUCE R. GILBERT,
1111 - 19th Street, N.W.
Suite 406
Washington, D.C. 20036
(202) 223-8866
Counsel for Petitioners.

Counsel of Record

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED FOR REVIEW

Whether the Secretary of the Department of Health and Human Services was authorized to issue an administrative instruction terminating the long-standing right of home health agencies to elect to receive Medicare payments directly from the federal government.

Whether the Court of Appeals for the District of Columbia Circuit exceeded the proper scope of its review by sustaining the authority for the agency's action on grounds which were not set forth in the administrative instruction.

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Petitioners, National Association of Home Health Agencies, *et al.*[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on September 14, 1982 reversing in part the opinion of the United States District Court for the District of Columbia.

OPINIONS BELOW

The Circuit Court's decision is published in CCH Medicare and Medicaid Guide [New Matters] ¶ 32,201 (D.C.

[1] A list of the parties which appeared below and their member organizations and parent companies is provided in Appendix H.

Cir. 1982). Appendix A. The opinion of the District Court, which the District of Columbia Circuit partially reversed, is published in CCH Medicare and Medicaid Guide [1982 Transfer Binder] ¶ 31,873 (D.D.C. 1982). Appendix C.

JURISDICTION

The judgment of the District of Columbia Circuit Court of Appeals was entered on September 14, 1982. A timely motion for a stay of mandate was filed on September 29, 1982 and was granted for a period of 30 days on October 27, 1982. A timely motion for an extension of the stay of mandate until the filing of this petition was filed on November 24, 1982. This petition was filed within ninety days of the date of the entry of the judgment of the District of Columbia Circuit Court of Appeals. This Court's jurisdiction is envoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATORY PROVISIONS INVOLVED

The following statutes and substantive rules are relevant to this matter and are set forth in pertinent part in Appendices E, F, and G:

42 U.S.C. § 1395g(a);

42 U.S.C. § 1395h(a);

42 U.S.C. § 1395kk(a);

42 C.F.R. § 421.103(a) and (b);

42 C.F.R. § 421.104(b)(1) and (2);

Part A Intermediary Letter A-81-32

STATEMENT OF THE CASE

This action was instituted by two national associations of home health agencies, a corporation which owns and operates 48 home health agencies, and 37 individual home health agencies to enjoin an administrative instruction

issued by the Secretary of the Department of Health and Human Services ("Secretary") on December 8, 1981. By means of that administrative instruction, the Secretary sought to abolish the right of freestanding home health agencies to have Medicare reimbursement determinations and payment made directly by the Secretary's Office of Direct Reimbursement ("ODR") and to compel all freestanding home health agencies to use non-governmental intermediaries. Appendix G. The Secretary's instruction represented a reversal of a policy which had been in effect continuously during the 15-year history of the Medicare program under which home health agencies were accorded the right, which they were encouraged to exercise, to elect to deal directly with the Secretary rather than through an intermediary.

The petitioners and their members had exercised that right and spent millions of dollars developing electronic data processing and billing procedures which conformed to those used by ODR. The Secretary's December 8, 1981 instruction sought to sever those relationships and to compel all freestanding home health agencies to begin using non-governmental intermediaries designated on a statewide basis.

On December 24, 1981, petitioners filed suit to temporarily restrain and preliminarily enjoin the Secretary's action which was to be implemented over the course of calendar year 1982 based on the beginning of the freestanding home health agencies' fiscal years. Petitioners' motion for a temporary restraining order was denied on December 29, 1981 and the case was set for an expedited hearing. Subsequently, however, the Secretary sought to accelerate implementation of his action before the District Court could act, and petitioners were granted

a temporary restraining order on March 1, 1982. Appendix D, 66a.

On March 10, 1982, the District Court issued its decision finding that it had jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction), that the Secretary's administrative instruction violated petitioners' right to elect direct payment under 42 U.S.C. § 1395g(a) and 42 C.F.R. §§ 421.103 and 421.104, that the instruction was not authorized under any of the statutory bases cited by the Secretary, and that the instruction was issued in violation of the rulemaking requirements of the Administrative Procedure Act (5 U.S.C. § 553).

On September 14, 1982, the Court of Appeals affirmed the District Court's decision with respect to jurisdiction and the rulemaking requirements of the Administrative Procedure Act, but reversed the District Court's decision with respect to petitioners' right to direct payment. Petitioners seek review of only that portion of the District Court decision which was reversed.

REASONS FOR GRANTING THE WRIT

1. The Issue In This Case Is Of Extreme Importance To All Health Care Providers Which Participate In The Medicare Program.

The Secretary's December 1980 instruction would have forced 469 freestanding home health agencies to sever their relationships with ODR and begin receiving Medicare reimbursement determinations and payments through an intermediary. Petitioners presented uncontradicted evidence that the Secretary's policy, if implemented, would cost the directly affected home health agencies $10 million to $30 million and would result in the disruption and less efficient administration of Medicare home health benefits.

In addition, petitioners presented undisputed evidence that the Secretary's policy would cost the Medicare program millions of dollars in order to equip, train and reimburse the intermediaries to perform the very same services which had been performed by ODR in a highly efficient manner.

Finally, it was undisputed that much of the additional cost to the home health agencies would not be compensated by Medicare, and that even those costs which Medicare would recognize would ultimately be borne by the Medicare beneficiaries and other contributors to the Medicare trust fund. By contrast, the Secretary never produced a single study or analysis comparing the cost and efficiency of abolishing the right to direct payment with the cost and efficiency of retaining that option.

Beyond the 469 freestanding home health agencies which would have been directly affected, the Secretary's policy would have abolished the right to elect direct payment for 2475[2] freestanding home health agencies which were then using an intermediary. Such an option is extremely important for home health agencies using intermediaries because there are no formal appeal rights for a home health agency, or any other type of participating Medicare provider, to obtain relief from an intermediary which fails to efficiently administer Medicare payments.

The Court of Appeals decision, however, contains additional adverse consequences for providers of health care under the Medicare program which were not contained in the Secretary's December 1981 instruction. The sole

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[2] See Plaintiff's Exhibit 37 in the District Court Record.

statutory basis cited in the Secretary's December 1981 instruction was the Omnibus Budget Reconciliation Act of 1980 which directed the Secretary to designate regional intermediaries for freestanding home health agencies.[3] Appendix G, 73a. Both the Court of Appeals and the District Court held that the 1980 amendment merely directed the Secretary to abolish the choice of intermediaries for those freestanding home health agencies which wished to use an intermediary but that the 1980 amendment did not compel or authorize the Secretary to force all home health agencies to use an intermediary rather than ODR.

The Court of Appeals upheld the Secretary's authority to abolish the right to direct payment and relied upon 42 U.S.C. § 1395kk which was not cited in the Secretary's instruction. In reaching its decision, the Court determined that § 1395kk "would authorize the Secretary to perform *any* of his Medicare functions, including his reimbursement functions, either directly or indirectly . . ." (emphasis in original). Appendix A at 20a. Thus, the Court of Appeals holding jeopardizes not only the rights of 2944[4] freestanding home health agencies but also the rights of 12,800[5] other Medicare health care providers, including 1295[6] providers which currently receive direct payment through ODR.

It is clear that the Secretary would not hesitate to exercise his authority broadly if he were not currently

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[3] Pub. L. No. 96-499, § 930(o), 94 Stat. 2599, 2632 (1980) (codified at 42 U.S.C. § 1395h(e)(4) (Supp. 1980)).

[4] See, Plaintiff's Exhibit 37 in the District Court Record.

[5] See, 47 Fed. Reg. 7269 (Feb. 18, 1982).

[6] *Id.*

enjoined because a proposed regulation has already been published which would alter existing regulations to permit the Secretary to abolish direct payment for all providers of health care services under the Medicare program. 47 Fed. Reg. 7269 (Feb. 18, 1982). Accordingly, petitioners contend that the issue presented is worthy of Supreme Court review because it is of great importance to 12,800 providers of health care which participate in the Medicare program.[7]

2. The Court Of Appeals Decision Raises An Issue Of Fundamental Importance To The Future Administration Of The Medicare Program.

By holding that the Secretary is authorized to perform "*any*" of his Medicare functions either directly or indirectly by contract, the Court of Appeals recognized a limitless grant of authority which could well cause a drastic change in the way the Medicare program is administered.

The Secretary is charged with performing numerous functions under the Medicare Act including issuing necessary regulations (42 U.S.C. § 1395hh), finally adjudicating reimbursement disputes (42 U.S.C. § 1395oo(f)(1)) and, of course, generally administering the Medicare Act

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[7] Resolution of the issue in this case will also avoid further litigation such as that represented by *Carl H. Newman, d/b/a Lydia E. Hall Hospital* v. *Schweiker*, Civil Action No. 82-0794 (D.D.C.) which seeks to enjoin the Secretary from abolishing the right to direct payment for a hospital. That litigation has been stayed pending the final outcome in this case.

itself (42 U.S.C. § 1395kk(a)).[8] Congress could not realistically have intended that the Secretary could contract out "any" of the functions he is charged with performing under the Medicare Act. Yet, the unqualified language of the Court of Appeals decision inevitably leads to that conclusion.

Furthermore, the Court of Appeals decision interpreting § 1395kk is in direct conflict with the holding in *St. Louis University* v. *Blue Cross*, 537 F.2d 282, 293 (8th Cir. 1976) *cert. denied*, 429 U.S. 977 (1976). In that case, the Court of Appeals for the Eighth Circuit held that the Secretary must retain sufficient power to review intermediary determinations in reimbursement disputes to assure compliance with Medicare statutes and regulations. Under the rationale of the Court of Appeals decision in this case, the Secretary would be permitted to contract out the very functions he was forbidden to delegate in *St. Louis University* v. *Blue Cross, supra.*

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[8] Examples of some of the other functions the Secretary is charged with performing under the Medicare Act are, determining annual the amount of the inpatient hospital deductible which Medicare patients must pay (42 U.S.C. § 1395e(b)(2)); certification of wages to be used as a basis for the tax to fund the Part A Medicare trust fund (42 U.S.C. § 1395i(a)); serving on the Board of Trustees for the Part A trust fund along with the Secretaries of Labor and the Treasury (42 U.S.C. § 1395i(b)); certification of funds from the Part A trust fund for Medicare beneficiary payments and administrative expenses (42 U.S.C. § 1395i(h)); determining the amount of premiums which Medicare beneficiaries must pay for Part B coverage (42 U.S.C. § 1395r)); serving on the Board of Trustees for the Part B trust fund along with the Secretaries of Labor and the Treasury (42 U.S.C. § 1395t(b)); deciding whether to waive fire and safety requirements in a hospital (42 U.S.C. § 1395x(e)); and appointing the Provider Reimbursement Review Board which reviews Medicare reimbursement disputes (42 U.S.C. § 1395oo(a)).

3. The Court Of Appeals Decision Is In Conflict With The Well Established Construction Of The Medicare Act By The Secretary And By Congress.

It is undisputed that the Secretary has interpreted the Medicare Act over its 15-year history as providing a right to providers to elect to be reimbursed directly by the government or through an intermediary. Appendix A, 3a. On February 23, 1966, less than seven months after the enactment of the original Medicare legislation, the Secretary's own Office of the General Counsel issued a legal opinion analyzing the same statutory provisions which are at issue in this case. That contemporaneous legal opinion concluded that Medicare providers have the option under 42 U.S.C. § 1395g(a) to receive direct payment and that none of the language contained in 42 U.S.C. § 1395kk eroded that "clear prerogative."[9]

Existing Medicare regulations unequivocally state that providers may receive Medicare payments through an intermediary or "exercise their *right* to receive payment directly . . ." (emphasis added) from the Secretary. 42 C.F.R. § 421.103(a) and (b); 42 C.F.R. § 421.104(b)(2). Those regulations embodying the agency's contemporaneous interpretation of the statute were originally promulgated in 1968 and were repromulgated on June 23, 1980 and again on October 1, 1980. Appendix F, 70a-71a.[10]

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[9] Court of Appeals, Joint Appendix, 180-181.

[10] The regulations were originally promulgated at 20 C.F.R. §§ 405.651(a) and 405.654 (33 Fed. Reg. 11277-78 (August 8, 1968)) as set forth in Appendix D. The regulations were subsequently repromulgated in their current form at 45 Fed. Reg. 42182 (June 23, 1980). They were subsequently recodified into title 42 of the Code of Federal Regulations. 45 Fed. Reg. 64912 (October 1, 1980).

There have been at least seven occasions beginning with the enactment of the original Medicare legislation in 1965 where Congress has clearly indicated that it intended for providers to have the right to deal directly with the Secretary.[11] That intent was reaffirmed most recently in the Conference Committee report accompanying the 1980 amendments to 42 U.S.C. § 1395h(e) which stated that

> [i]n requiring the designation of regional intermediaries for home health agencies, *it is not the intent of the conferees that home health agencies would be precluded from contracting directly with the Health Care Financing Administration.*

(Emphasis supplied.) H. Conf. Rep. No. 96-1479, 96th Cong., 2d Sess., 129 (1980). Accordingly, there is an unbroken line of expressions of congressional intent stretching from the enactment of the Medicare legislation in 1965 through the enactment of the 1980 amendments which indicates that Congress intended for providers to have the option of direct payment.

In reviewing the District Court's decision, the Court of Appeals rejected the agency's own contemporaneous interpretation of the statute, its subsequent 15-year interpretation of the statute, the agency's own regulatory provisions, as well as the numerous consistent ex-

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[11] S. Rep. No. 404, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. and Admin. News 1993; H.R. Rep. No. 213, 89th Cong., 1st Sess., 45 (1965); S. Rep. No. 404, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. and Admin. News, 2104; H.R. Rep. No. 213, 89th Cong., 1st Sess., 147-48 (1965); H.R. Rep. No. 95-393, Part I, 95th Cong., 1st Sess., 68 (1977); H.R. Rep. No. 95-393, Part II, 95th Cong., 1st Sess., 76 (1977); H. Conf. Rep. No. 96-1479, 96th Cong., 2d Sess., 129 (1980).

pressions of congressional intent all of which repeatedly confirm that providers have the option to be reimbursed directly rather than through an intermediary. The Court of Appeals relied instead on two isolated statements from the legislative history to the original Medicare legislation, one of which merely parrots the language of 42 U.S.C. § 1395kk and neither of which addresses the situation where a provider wishes to deal directly with the government.[12]

The analysis by the Court of Appeals represents a radical departure from the type of analysis this Court has adopted in examining the reversal of an agency's interpretation of a statute it has administered for a period of years. Typically, an agency's abrupt reversal of its interpretation of a statute will not be sustained where that interpretation is contrary to the agency's interpretation which is more contemporaneous with the enactment of the statute, the agency's long-standing practice, and consistent expressions of legislative intent indicating that Congress understood and supported the agency's original interpretation. *Watt* v. *Alaska*, 451 U.S. 259, 101 S.Ct. 1673, 1681 (1981); *Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1 (1976); *General Electric Company* v. *Gilbert*, 429 U.S. 125, 142 (1976); *Morton* v. *Ruiz*, 415 U.S. 199, 228-230 (1974); *United States* v. *Leslie Salt Company*, 350 U.S. 383, 396 (1956); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 308-315 (1933).

In cases where an agency charged with administration of a statute has sought to reverse a long-standing practice which was based upon its own contemporaneous in-

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[12] S. Rep. No. 404, 89th Cong., 1st Sess., 53, *reprinted in* 1965 U.S. Code Cong. and Admin. News 1943, 1944; H.R. Rep. No. 213, 89th Cong., 1st Sess., 1974 (1965).

terpretation, this Court has required a careful examination of the legislative history of the statute to determine whether there exists ". . . the clear indication of legislative intent that we might expect before recognizing such a change in policy . . ." *Train* v. *Colorado Public Interest Research Group, supra,* 24. *See also Watt* v. *Alaska, supra,* 101 S.Ct. at 1681. The legislative history of the statutory provisions which were at issue before the Court of Appeals does not contain any indication that Congress intended to abrogate the long-standing practice of permitting providers to receive Medicare reimbursement determinations and payment directly from the government. To the contrary, every reference to that policy in the legislative history of the Medicare Act from 1965 until as recently as 1980, indicates that Congress intended for the policy to remain unchanged.

The Court of Appeals relied on the principle that powers once granted by Congress are not lost by being allowed to lie dormant. *See United States* v. *Morton Salt Company,* 338 U.S. 632, 647-48 (1950). That principle loses relevance, however, in a case such as this where the agency charged with administration of the statute interprets the scope of its powers at the time of the statute's enactment, follows that interpretation for 15 years, incorporates it into its regulations, and where Congress repeatedly refers to and endorses that interpretation in subsequent legislative history.

Since the inception of the Medicare program, the Secretary has interpreted 42 U.S.C. §§ 1395g, 1395h and 1395kk as not conferring authority upon the Secretary to compel providers to use intermediaries. Accordingly, this case does not involve a situation where an agency's powers have lain dormant or been ignored. The Secretary's authority with respect to use of intermediaries has been

the subject of extensive administrative and congressional review and has never been found to permit the prohibition of direct payment.

4. The Court Of Appeals Decision Ignores A Fundamental Principle Of Statutory Construction.

It is a fundamental principle of statutory construction that a more specific statute will be given precedence over a more general one. *Busic* v. *United States*, 446 U.S. 398, 406 (1980). The statutory provision on which petitioners rely, 42 U.S.C. § 1395g, expressly directs the Secretary to make Medicare determinations and payment to providers of services "under this part."[13] Section 1395g is contained in Part A of the Medicare Act which encompasses specific provisions for Medicare reimbursement for participating providers of services. *See* 42 U.S.C. §§ 1395c-1395i-2. By contrast, 42 U.S.C. § 1395kk, on which the Court of Appeals relied, confers general contracting authority upon the Secretary for unspecified "functions." Further, that statutory provision is contained in Part C of the Medicare Act which encompasses certain miscellaneous sections applicable to Parts A and B. 42 U.S.C. §§ 1395x-1395ww.

If the Court had applied the foregoing established tool of statutory construction in this case, it would have reached the same conclusion as the agency's Office of the General Counsel in its February 23, 1966 memorandum. That memorandum concluded that while the Secretary may have the power under 42 U.S.C. § 1395kk to contract

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[13] By contrast, 42 U.S.C. § 1395h which governs the Secretary's authority to use intermediaries, states applies only where a provider "wishes" to have Medicare payments made through an intermediary. 42 U.S.C. § 1395h(a).

out certain of his functions, he does not have the power under § 1395kk to force a provider to use an intermediary because his authority to perform that function is specifically controlled by 42 U.S.C. §§ 1395g and 1395h. By totally ignoring the difference in scope between §§ 1395g and 1395h on the one hand and § 1395kk on the other, the Court of Appeals decision is in conflict with Supreme Court precedent and with an established principle of statutory construction.

5. The Court Of Appeals Decision Conflicts With Established Supreme Court Precedent Regarding The Proper Scope Of Judicial Review.

In *Securities and Exchange Commission* v. *Chenery Corporation*, 332 U.S. 194, 195-196 (1947), this Court found it to be a fundamental rule of administrative law that

> . . . a reviewing court, in dealing with a determination . . . which an administrative agency alone is authorized to make, must judge the propriety of such action solely on the grounds invoked by the agency.

That principle has been reaffirmed recently in *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, 448 U.S. 607, 631 (1980).

In this case, the Court of Appeals exceeded the bounds established by this Court in *Chenery*. The only ground for the Secretary's action which was set forth in the December 1981 instruction was "P.L. 96-499," the Omnibus Budget Reconciliation Act of 1980. Appendix G, 73a. The Court of Appeals concluded that the Secretary's action was not authorized or directed by that legislation. Appendix A, 28a.

The Court of Appeals, however, substained the Secretary's authority to take the action described in the December 1981 instruction based solely upon 42 U.S.C.

§ 1395kk. That statutory provision was not cited in the administrative instruction and was suggested as support for the agency's action for the first time in briefs filed by agency counsel. An established corollary to the *Chenery* rule is that

> [t]he courts may not accept appellate counsel's *post hoc* rationalizations for agency action . . ."

Burlington Truck Lines, Inc. v. *United States*, 371 U.S. 156, 168 (1962). Accordingly, the Court of Appeals' reversal of the District Court decision was in direct conflict with the decisions of this court regarding the scope of judicial review.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the District of Columbia Circuit Court to the extent that it reversed the decision of the District Court for the District of Columbia.

Respectfully submitted,

JAMES C. PYLES,
RONALD N. SUTTER,
BRUCE R. GILBERT,
BY RONALD N. SUTTER
Counsel for Petitioners.

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120982